Filed 5/25/16 In re FairWageLaw CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Matter of FAIRWAGELAW, In Voluntary Dissolution,	G050611 (Super. Ct. No. 05CC01320)
JOHN M. HEURLIN, Plaintiff, Cross-defendant and Appellant, v. FAIRWAGELAW APC, et al., Defendants, Cross-complainants and Respondents.	(Super. Ct. No. 06CC04192) O P I N I O N

Appeal from a nonappealable judgment of the Superior Court of Orange County, Andrew Banks, Judge. Appeal treated as petition for writ of mandate. Petition granted.

John M. Heurlin, in pro. per., for Plaintiff, Cross-defendant and Appellant.

Law Office of Garett S. Gregor and Garrett S. Gregor for Defendants, Cross-complainants and Respondents.

* * *

Plaintiff John M. Heurlin appeals from the judgment dismissing his complaint after the court granted the summary judgment motion of defendants Henry P. Schrenker, David J. Fuller, the Schrenker Law Firm, Fuller & Schrenker, and FairWageLaw. However, the judgment from which the appeal is taken is not final. Cross-complaints against Heurlin have not yet been adjudicated and remain pending in the trial court. Under the circumstances of this 11-year-old case, and in light of the limited issues presented for review, we exercise our discretion to treat Heurlin's appeal as a petition for writ of mandate. We grant the petition for writ of mandate and direct the trial court to vacate the judgment of dismissal. Defendants did not meet their initial burden of production to show, for purposes of their affirmative defense of judicial estoppel, that Heurlin had *successfully* asserted a position in a prior bankruptcy proceeding that was inconsistent with his stance in the current action.

Finally, because we are treating this appeal as a petition for writ of mandate, we also address the normally nonappealable order denying Heurlin's motion for summary adjudication on his claim for quantum meruit. Our hope (perhaps futile) is to move this litigation forward with greater speed than has heretofore been the case. We conclude Heurlin failed to meet his burden to establish a legally viable claim for quantum meruit. As a matter of law, Heurlin is not entitled to a judgment on this legal theory. He is entitled to an accounting, however, and a decision on the competing claims of breach of fiduciary duty, issues that will require a trial. Thus, the court's denial of Heurlin's motion for summary adjudication was proper, but on a different ground than the judicial estoppel defense proffered by defendants.

FACTS

"Heurlin and two other lawyers, [Fuller and Schrenker], formed FairWage[Law] as one-third shareholders intending to prosecute wage and hour class actions. Fuller and Schrenker voted to voluntarily dissolve FairWage[Law] in February 2005, when they discovered Heurlin would be suspended for two years from practicing law." (*In re FairWageLaw* (2009) 176 Cal.App.4th 279, 282 (*FWL*).) "FairWage[Law] petitioned the court to take jurisdiction over the voluntary dissolution." (*Ibid*.) "The court granted the petition in October 2005." (*Ibid*.) The litigation by and between FairWageLaw and its former shareholders has continued, essentially unabated, ever since.

This is the *fourth* trip to this court in the course of the now decade-old court supervision over the voluntary dissolution of FairWageLaw. In 2006 we dismissed Heurlin's appeal from various nonappealable interlocutory orders. (*In re FairWageLaw* (Dec. 7, 2006, G037378) [nonpub. opn.].) Later, in a published decision, we reversed a judgment dissolving and winding up FairWageLaw because the court had rendered a monetary judgment against Heurlin in a proceeding lacking due process. (*FWL*, *supra*, 176 Cal.App.4th 279.) We ended the discussion in that opinion by saying, "Before the corporation is wound up, both Heurlin and the corporation should have the opportunity to litigate their respective claims against each other in the normal adversary fashion — complaint, answer, discovery, dispositive motions if any, and trial." (*Id*. at p. 288.) And litigate they did. Heurlin had a preexisting complaint on file against Schrenker, Fuller, the Schrenker Law Firm, and Fuller & Schrenker asserting various direct and derivative claims. (*Id*. at p. 283.) After the remand, FairWageLaw, Fuller, Schrenker, the Schrenker Law Firm, and Fuller & Schrenker filed cross-complaints against Heurlin seeking declaratory relief, and alleging fraud, breach of fiduciary duty, and willful misconduct causes of action. (*In re FairWageLaw* (Nov. 9, 2011, G044141) [nonpub.

opn.].) Heurlin responded by filing motions to strike the cross-complaints pursuant to the anti-SLAPP statute. (Code Civ. Proc., § 415.16.) We affirmed the court's order denying the anti-SLAPP motions. (*In re FairWageLaw, supra*, G044141) Now, in this fourth trip to our court, we are called upon to review the "judgment" of dismissal of Heurlin's complaint following the court's order granting defendants' motion for summary judgment. Heurlin also argues his own motion for summary adjudication was wrongly denied.

Heurlin first moved for summary judgment against defendants seeking $741,000 plus interest on his quantum meruit claim, and stating that if judgment were granted he would dismiss his other causes of action. In reality, this was a motion for summary adjudication of a single cause of action, combined with a conditional promise to dismiss his remaining causes of action if he won. He also sought summary judgment on the pending cross-complaints against him, alleging that cross-complainants had suffered no compensable damage. Alternatively, he sought summary adjudication in his favor on five issues, including that the reasonable value of the services he provided to FairWageLaw was $741,000, and that Fuller and Schrenker fraudulently transferred FairWage's assets to themselves and their business entities without obtaining any value for the transfer. Heurlin argued he worked 1,764 hours from February of 2004 through February of 2005, and had received no compensation for his work.

Not to be outdone, defendants cross-moved for summary judgment on Heurlin's complaint on grounds, inter alia, that their affirmative defense of estoppel barred Heurlin from recovering any amount of damages or restitution. Their separate statement of undisputed material facts asserted Heurlin had filed a bankruptcy petition in October 2008, which disclosed to the bankruptcy court, the chapter 13 trustee, and his creditors that, inter alia, (1) he had no interest in any accounts receivable, (2) no liquidated debts were owed to him, and (3) he possessed no contingent or unliquidated claims. Their separate statement further asserted: "The Chapter 13 Trustee had received

Heurlin's documents, analyzed them, advised the creditors and the court of the representations made under oath by Heurlin, [and] generated and filed reports based on statements made by Heurlin under penalty of perjury." "The court had analyzed objections to the Chapter 13 Trustee's reports and, finding none, discharged the Trustee and exonerated his bond." Exhibit D to defendants' summary judgment motion consisted of copies of documents from Heurlin's bankruptcy file.

Heurlin opposed defendants' summary judgment motion and made evidentiary objections to defendants' exhibits (including his bankruptcy filings). Heurlin declared, inter alia, that, around November 18, 2008, defendants' counsel attended the creditors' meeting in his bankruptcy proceeding and "offered $50,000 on the debt of $740,838 plus interest," causing Heurlin and his wife, based upon the advice of their bankruptcy counsel and the chapter 13 trustee, to dismiss the bankruptcy; and that he and his wife never appeared before a judge or obtained discharge of their debts in the proceeding.

In defendants' reply, they contended, inter alia, "Heurlin obtained success the moment he filed for bankruptcy protection because the filing precluded Citibank from foreclosing on his home."

The court granted defendants' summary judgment motion and entered a judgment of dismissal of Heurlin's complaint, finding, as a matter of law, that Heurlin's complaint was barred by the doctrine of judicial estoppel. As to the success element of judicial estoppel (discussed below), the court ruled "Heurlin achieved success in asserting his claims and denials" in a prior bankruptcy proceeding because the automatic stay precluded creditors from any attempt at collection, and created "the impression no funds would be available for distribution to unsecured creditors." "The automatic stay in the Bankruptcy Court afforded him the opportunity to obtain a favorable evaluation by the Trustee that his was a minimal asset bankruptcy with little possibility of any recovery for the unsecured creditors."

The court denied Heurlin's summary judgment motion in its entirety, finding that the doctrine of judicial estoppel barred his complaint and each of his causes of action. As to the portion of Heurlin's motion seeking judgment on the cross-complaints against him, the court found, inter alia, it was not clear which cross-complaint or cause of action the motion was directed to. And as to Heurlin's five alternative issues, the court ruled they did not completely dispose of a cause of action or affirmative defense. A judgment of dismissal was entered only on Heurlin's complaint.

DISCUSSION

Appealability of Judgment of Dismissal — Treatment as Petition for Writ of Mandate

The parties' initial briefs on appeal failed to address whether the judgment of dismissal on Heurlin's complaint was appealable in light of defendants' still pending cross-complaints against Heurlin. (See, e.g., *Angell v. Superior Court* (1999) 73 Cal.App.4th 691, 698 ["[W]hen a judgment resolves a complaint, but does not dispose of a cross-complaint pending between the same parties, the judgment is not final and thus not appealable"].) We asked the parties to submit supplemental letter briefs on whether the judgment of dismissal is appealable, and, if the judgment is not appealable, whether grounds exist to treat the appeal as a petition for writ of mandate. (*Olson v.* Cory (1983) 35 Cal.3d 390, 398-401.)

In response, defendants forthrightly acknowledged the judgment of dismissal was *not* appealable because of the pending unadjudicated cross-complaints between the same parties.

Heurlin, on the other hand, weakly argued the order denying his motion for summary judgment as to the cross-complaint is appealable under Code of Civil Procedure section 906 and *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 344. Both authorities are inapt. Code of Civil Procedure section 906 merely describes the

powers of the reviewing court upon an appeal from an appealable judgment, including the power to review intermediate rulings that affect the judgment appealed from. It does *not* say the reviewing court has the power to review interim rulings in the *absence* of a final appealable judgment. And the holding of the court in *Federal Deposit Ins. Corp. v. Dintino* 167 Cal.App.4th 333, held that an order denying a motion for summary judgment may be reviewed *after* a final trial on the merits, provided the issue addressed in the motion was *not* addressed in the trial on the merits. Here, there is no final judgment. The general rule applies. "An order denying a motion for summary judgment or summary adjudication is not an appealable order." (*Id*. at p. 343.)

Both parties urge, however, that we exercise our discretion to treat this appeal from the nonappealable judgment as a petition for writ of mandate. We conclude it is appropriate to do so as a common law writ under Code of Civil Procedure section 1084 et seq.[1] The Supreme Court in *Olson v. Cory*, *supra*, 35 Cal.3d 390, held we have the power to treat the appeal as a petition for writ of mandate "under unusual circumstances." (*Id*. at p. 401.) Here, the briefing in this matter was limited to the judicial estoppel issue, the ground upon which the trial court rendered its decision, and whether quantum meruit is a remedy available to Heurlin. "To require the parties to wait for resolution of [defendant's judicial estoppel and quantum meruit] claim[s] until disposition of all matters yet to be resolved by the trial court might lead to unnecessary trial proceedings . . . ." (*Id*. at p. 400.) For example, if the matter were remanded without our ruling on the judicial estoppel issue, trial would proceed on the cross-complaints. If

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[1] In our view, proceeding by way of a common law writ under Code of Civil Procedure section 1084 et seq. is more appropriate than by way of the statutory writ procedure under Code of Civil Procedure section 437c, subdivision (m)(1), because of the timeliness requirement for the statutory writ. The statutory writ requires the writ petition to be filed "within 20 days after service . . . of a written notice of entry of the order." (Code Civ. Proc., § 437c, subd. (m)(1).) The notice of ruling on the summary judgment motions was served on June 24, 2014. The notice of appeal was filed on August 25, 2014, more than 20 days after service of the ruling.

we were then to rule on a subsequent appeal that the judicial estoppel issue was wrongly decided, still another trial or summary judgment proceeding would be necessary. Judicial economy requires that we resolve the limited issues presented at this time so that the entire matter can be resolved below, hopefully with no further trips to this court until a true final judgment is entered. This case has been pending for some 11 years, this is the fourth trip to the Court of Appeal, and it is way past the time when this case should have been resolved. Failure to treat this appeal as a petition for writ of mandate would serve only to further delay the case. The "issue[s] of [judicial estoppel and quantum meruit have] been thoroughly briefed and argued, and all parties strongly urge that we decide it rather than dismiss the appeal. To dismiss the appeal rather than exercising our power to reach the merits through a mandate proceeding would, under the unusual circumstances before us, be ""'unnecessarily dilatory and circuitous."'" (*Id.* at p. 401.) Accordingly, we treat the present appeal as a petition for writ of mandate.

Defendants Failed to Show Heurlin's Claims Were Barred by Judicial Estoppel

Heurlin contends the court erred by granting defendants' summary judgment motion on grounds of judicial estoppel because defendants failed to show he succeeded in his bankruptcy proceeding.

A defendant moving for summary judgment "bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Preliminarily, a defendant moving for summary judgment based on an affirmative defense bears an initial burden of production to show "that undisputed facts support each element of the affirmative defense." (6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 237, p. 681.) "'If the defendant does not meet this burden, the motion must be denied.'" (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.)

Here, defendants, as to their summary judgment motion, bore an initial burden of production to make a prima facie showing that no triable issue of material fact existed as to any element of their affirmative defense of judicial estoppel. As we shall explain, defendants failed to show Heurlin succeeded in his bankruptcy proceeding.

The doctrine of judicial estoppel applies "when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183 (*Jackson*); *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987.)

"'[J]udicial estoppel *is an equitable doctrine*, and its application, even where all necessary elements are present, is discretionary.' [Citations.] Moreover, because judicial estoppel is an extraordinary and equitable remedy that can impinge on the truth-seeking function of the court and produce harsh consequences, it must be 'applied with caution and limited to egregious circumstances' [citations], that is, '"'when a party's inconsistent behavior will otherwise result in a miscarriage of justice.'"'" (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 449.)

"The third *Jackson* factor requires that the party to be estopped was successful in asserting the first position. [Citation.] This means not just that the party prevailed in the earlier action, but that 'the tribunal adopted the position or accepted it as true . . . .'" (*The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 845 (*Swahn*).)

"The factor of success — whether the court in the earlier litigation adopted or accepted the prior position as true — is of particular importance." (*Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 170-171 (*Jogani*.) As explained by the United States Supreme Court, "[a]bsent success in a prior proceeding, a party's later inconsistent position introduces no "'risk of inconsistent court determinations' [citation], and thus

poses little threat to judicial integrity." (*New Hampshire v. Maine* (2001) 532 U.S. 742, 750-751.) In contrast, when a party succeeds in persuading a court to accept that party's earlier position, "judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled' [citation].'" (*Id.* at p. 750.)

In the case at hand, "[f]ederal precedent is particularly important . . . given the need for uniformity in our national bankruptcy system and the concomitant desire for a consistent, predictable approach in determining the effect of exclusively federal proceedings." (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 138 (*Gottlieb*).) California cases, too, have held the success requirement is not met where there is no judicial acceptance of the party's prior position. (*Id*. p. 130; *Jogani*, *supra*, 141 Cal.App.4th at p. 172; *Swahn*, *supra*, 183 Cal.App.4th at p. 845; *Minish*, *supra*, 214 Cal.App.4th at pp. 454-455.)

In *Gottlieb*, the trial court granted summary judgment in the defendant's favor on the ground of judicial estoppel. (*Gottlieb*, *supra*, 141 Cal.App.4th at p. 120.) In an earlier bankruptcy proceeding, the plaintiff had failed to list as an asset a contingent legal claim it was required to disclose (*id*. at pp. 120, 136) and the bankruptcy judge had issued a stipulated order, but dismissed the case two months later (*id.* at p. 126). The Court of Appeal reversed the summary judgment (*id*. at p. 147), explaining the plaintiff did not "successfully assert[] an inconsistent position in a prior case" (*id*. at p. 130): "[T]he bankruptcy court did not adopt or accept the truth of [the plaintiff's] position that [his company] did not have any legal claims. Neither the automatic stay nor the stipulated order constituted prior success. And the bankruptcy case was dismissed without confirmation of a plan of reorganization. In these circumstances, the trial court erred in barring the complaint under principles of judicial estoppel." (*Ibid.*)

Here, there is no evidence in the record that the bankruptcy court adopted Heurlin's earlier position or that it "'*accepted* [his position] as true and *granted relief on*

that basis.'" (*Gottlieb*, *supra*, 141 Cal.App.4th at p. 137.) There is no evidence the bankruptcy court confirmed a payment plan or discharged any of Heurlin's debts. Defendants presented evidence the bankruptcy court discharged the trustee and exonerated his bond, but these actions took place after Heurlin dismissed his petition. The evidence reveals Heurlin filed his petition on October 15, 2008, and the Heurlins filed a request for dismissal about two months later, on December 17, 2008. "Such a dismissal is intended to '"undo the bankruptcy case, as far as practicable, and restore all property rights to the position in which they were found at the commencement of the case."'" (*Gottlieb* at p. 141.)

Defendants contend *Thomas v. Gordon* (2000) 85 Cal.App.4th 113 (*Thomas*) supports the trial court's application of judicial estoppel to grant them summary judgment. In *Thomas*, the plaintiff had made *three* bankruptcy filings over the course of *14 months* (including two separate bankruptcy petitions), in which she had failed to disclose her interest in two corporations. (*Id.* at p. 117.) In the later lawsuit, she "*brazenly admit*[*ted*] that she transferred her most valuable asset — her income stream — to [one of the corporations] owned wholly by her paramour in order to keep it out of the hands of her creditors." (*Id.* at p. 119, italics added.) The Court of Appeal affirmed the trial court's grant of summary judgment in the defendant's favor (*id.* at p. 115), despite the plaintiff's contention she did not succeed in the earlier proceedings "because both of her bankruptcy petitions were dismissed" (*id.* at p. 118). The appellate court first stated that the success element is not necessarily an essential requirement for judicial estoppel and concluded: "Assuming that the doctrine of judicial estoppel should be applied to an unsuccessful litigant only in the rare situation where the litigant has made an egregious attempt to manipulate the legal system, we agree with the trial court that 'this is as egregious as it gets . . . .'" (*Id.* at p. 119.) The appellate court further concluded the plaintiff did succeed in the bankruptcy proceedings because she received the benefit of an

automatic stay (*ibid.*): The plaintiff "was able to twice forestall creditor action for substantial periods of time." (*Id.* at p. 120.)

"*Thomas's* view that judicial estoppel may apply even when a litigant's initial position was unsuccessful is not the majority position, and that view has been questioned" (*Minish*, *supra*, 214 Cal.App.4th at p. 453), particularly "in light of the language of *New Hampshire v. Maine*, *supra*, 532 U.S. at pages 750-751" (*Swahn*, *supra*, 183 Cal.App.4th at p. 848). Furthermore, "in post-*Thomas* cases, the California Supreme Court has always included success as a necessary *element*." (*Minish*, at p. 453.) As to *Thomas*'*s* view that the automatic stay in bankruptcy proceedings constitutes success for the purpose of the doctrine of judicial estoppel, *Gottlieb* expressly declined "to follow the *Thomas* dicta" (*Gottlieb*, *supra*, 141 Cal.App.4th at p. 147) because the *automatic* stay is not premised in any way on the bankruptcy petitioner's nondisclosures (*id*. at p. 142) and "'is not a benefit that threatens judicial integrity in a way sufficient to provide a basis for judicial estoppel'" (*id.* at p. 144). Furthermore, in *Gottlieb*, the only success the plaintiff "arguably achieved in the Chapter 11 case was a four-month postponement of its loss of [a development] project." (*Id.* at p. 145.)

Thomas is distinguishable from, and more egregious than, the instant case. And to the extent *Thomas* holds that the automatic bankruptcy stay constitutes success for the purpose of the doctrine of judicial estoppel, we decline to follow it. Here, Heurlin obtained a mere two-month stay, and made no admissions (if any) as brazen as those pleaded by the plaintiff in *Thomas*.

Defendants failed to meet their initial burden of production on their affirmative defense of judicial estoppel. The trial court erred in applying judicial estoppel because the material facts necessary to show the bankruptcy court adopted or accepted as true Heurlin's position were neither undisputed nor conclusively established.[2]

Heurlin's Summary Judgment Motion on His Complaint Was Properly Denied

Because the court ruled Heurlin's entire complaint was barred by the doctrine of judicial estoppel, it never ruled on the merits of Heurlin's summary adjudication motion on his quantum meruit claim. In this writ proceeding, we exercise our discretion to review the merits of that motion in the interest of judicial expedition and economy.

Heulin's quantum meruit claim is simple to state, but legally erroneous. Heurlin submitted evidence that between February 2004 and February 2005, he worked 1,763.9 hours for FairWageLaw, and that, following dissolution of the corporation, the successor firm collected compensation in the class action litigation he had worked on, which included the recovery of compensation for Heurlin's time at the rate of $420 per hour, but that he had not been paid *any* of those proceeds. Heurlin believes he is entitled to every penny of the proceeds derived from his work performed while a shareholder of FairWageLaw as though he were a creditor of the corporation and not a shareholder. The law is otherwise.

First, the leading case of *Jewel v. Boxer* (1984) 156 Cal.App.3d 171 (*Jewel*) held that upon dissolution of a law partnership and "in the absence of a partnership agreement, the Uniform Partnership Act requires that attorneys' fees received on cases in progress upon dissolution of a law partnership are to be shared by the former partners

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[2] Defendants have waived their contention Heurlin's claims were barred by equitable estoppel due to inadequate briefing of this issue on appeal. Defendants do not contest the court's rejection of their unclean hands defense.

according to their right to fees in the former partnership, regardless of which former partner provides legal services in the case after the dissolution. The fact that the client substitutes one of the former partners as attorney of record in place of the former partnership does not affect this result." (*Id*. at p. 174.) In *Fox v. Abrams* (1985) 163 Cal.App.3d 610 (*Fox*), the court held that upon dissolution of a law corporation "[t]he same reasoning [as in *Jewel*] compels the conclusion . . . that the work in process on the dates of the resignations was unfinished business of the former firm; [and] that the parties were entitled to share in the fees subsequently derived in proportion to their interests in the former firm . . . ." (*Id*. at p. 614.)

The *Jewel* court also noted that "the former partners are obligated to ensure that a disproportionate burden of completing unfinished business does not fall on one former partner or one group of former partners, unless the former partners agree otherwise. It is unlikely that the partners, in discharging their mutual fiduciary duties, will be able to achieve a distribution of the burdens of completing unfinished business that corresponds precisely to their respective interests in the partnership. But partners are free to include in a written partnership agreement provisions for completion of unfinished business that ensure a degree of exactness and certainty unattainable by rules of general application. If there is any disproportionate burden of completing unfinished business here, it results from the parties' failure to have entered into a partnership agreement which could have assured such a result would not occur. The former partners must bear the consequences of their failure to provide for dissolution in a partnership agreement." (*Jewel*, *supra*, 156 Cal.App.3d at pp. 179-180.)

Dickson, Carlson & Campillo v. Pole (2000) 83 Cal.App.4th 436 added an additional gloss to these general rules. "The partners of a dissolved partnership owe each other a fiduciary duty to complete the partnership's unfinished business, and the failure to discharge that duty is actionable. [Citations.] The fiduciary duty includes an obligation to act in the highest good faith and not to obtain any advantage over the other partners in

partnership affairs [citation], such as by causing another partner to bear a disproportionate burden of unfinished business to complete [citation]. The remedy for breach of that duty ordinarily is money damages, which can be credited in an accounting." (*Id.* at p. 445.) The court held that former partners of a dissolved law firm who had refused to assist in the completion of unfinished business may have failed to "do equity," but such failure was not a complete defense to their claim for compensation derived from the completion of unfinished business by the departing partners. The judgment of the trial court was reversed because "[i]t made no effort to quantify the damages caused by the plaintiffs' inequitable conduct so as to account for that amount in the accounting, as the "do equity" doctrine requires. There was no legal basis to deny *all* relief under the "do equity" doctrine, and the court had no discretion to do so. It is therefore necessary for us to return this matter to the trial court for a resolution of these issues." (*Id.* at p. 448.)

So too here. Heurlin's claim for compensation derived from the completion of FairWageLaw's unfinished business is simply not susceptible to summary adjudication. Heurlin's monetary claim cannot be based on a simple calculation of the hours worked and an hourly rate. As a one-third shareholder of FairWageLaw, he is entitled to share in its *profits*. Heurlin's claim for quantum meruit ignores the reality that a law firm's overhead expenses must be taken into account before the partners' (or shareholders') share of profits can be determined. (*Jewel*, *supra*, 156 Cal.App.3d at p. 180 ["[T]he former partners will be entitled to reimbursement for reasonable overhead expenses (excluding partners' salaries) attributable to the production of postdissolution partnership income; in other words, it is *net* postdissolution income, not gross income, that is to be allocated to the former partners"].) The *profits* of FairWageLaw must be determined by including the *profits* earned by its successors under *Jewel* and *Abrams*.

Because of Heurlin's suspension from the practice of law, he was precluded from assisting with the completion of FairWageLaw's work in process. But that does not mean he is without any remedy. His remedy is as a shareholder of FairWageLaw who is entitled to share in its profits, including profits derived from the completion of the corporation's work in process, reduced to the extent the evidence persuades the trial court that Heurlin's suspension from the practice of law, and his consequent inability to assist with completing the work in process, has placed an unfair burden on defendants, and increased to the extent the evidence persuades the trial court that defendants breached their fiduciary duty to Heurlin.This calculation requires, at a minimum, both an accounting and a trial on the respective claims for breach of fiduciary duty.[3] This is not the stuff from which summary judgments can be granted.

Heurlin Has Waived Review of His Summary Judgment Motion on the Cross-complaints and the Separate Issues for Which He Sought Adjudication

Heurlin's failure to separately discuss the court's ruling denying his motion for summary judgment on the cross-complaints, or to discuss the rulings on the separate issues for which he sought summary adjudication, has waived those issues on appeal. "[A]n appellant's failure to discuss an issue in its opening brief forfeits the issue on appeal." (*Christoff v. Union Pacific Railroad Co*. (2005) 134 Cal.App.4th 118, 125; Cal. Rules of Court, rule 8.204(a)(1)(B) [Each brief must "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if

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[3] The court is authorized to perform such an accounting in its supervision of the voluntary dissolution under Corporations Code section 1904: "The court, if it assumes jurisdiction, may make such orders as to any and all matters concerning the winding up of the affairs of the corporation and for the protection of its shareholders and creditors as justice and equity may require." Pursuant to section 1904 of the Corporations Code, section 1806 is also applicable in a voluntary dissolution. "[T]he jurisdiction of the court includes:" "(c) The determination of the rights of shareholders . . . in and to the assets of the corporation. (*Id*., subd. (c).)

possible, by citation of authority"].) Accordingly, we pass those issues without further analysis.

DISPOSITION

This appeal is treated as a petition for writ of mandate. The petition for writ of mandate is granted. Let a peremptory writ of mandate issue directing the trial court to vacate the judgment of dismissal. The parties shall each bear their own costs on appeal. Defendants' motion for sanctions and Heurlin's motion for judicial notice are denied.

IKOLA, J.

WE CONCUR:

O'LEARY, P.J.

RYLAARSDAM, J.